U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

February 10, 2014

BY ECF & BY HAND

The Honorable Richard M. Berman
United States District Judge
United States District Court
500 Pearl Street, Room 1320
New York, NY 10007

Re: Lehman Brothers Holdings, Inc. v. United States,
10 Civ. 6200 (RMB)

Dear Judge Berman:

We write to oppose the request by Lehman Brothers, made on February 7, 2014, for permission to submit a sur-reply in response to the Government's motion *in limine*. Because Lehman's request is little more than a thinly veiled attempt to make arguments now that it did not make in its original opposition brief — and because Lehman's five-page-long application is in essence a sur-reply brief in its own right — the Government believes it necessary to provide a brief substantive response to Lehman's request. For the reasons set forth herein, Lehman's request to submit a sur-reply brief should be denied.

Lehman tries to make much of the fact that the Government's rebuttal expert, Professor Tricia Brown, paused briefly in responding to Lehman's counsel's questions about Field Service Advice memoranda ("FSAs") written by the IRS Chief Counsel's Office that Lehman claims support its position in this case (though Lehman has never explained how, beyond conclusory assertions). Lehman had Professor Brown's complete deposition transcript well before any briefing on the Government's motion *in limine*, and should not be permitted a supplemental brief to address pauses in response to objectionable deposition questions. Any such arguments could have been but were not raised previously by Lehman. *See, e.g.*, *Nanopierce Techs., Inc. v. Southridge Capital Mgmt.*, No. 02 Civ. 0767 (LBS), 2008 WL 1882702, at *2 (S.D.N.Y. Apr. 21, 2008) ("no injustice was served by denying [plaintiff] leave to file a sur-reply" to address matters that "could have [been] addressed . . . in its opposition papers"). Moreover, Lehman's argument is misguided and disingenuous.

As a threshold matter, Lehman's reliance on FSAs is inappropriate. FSAs specifically state that they are "not binding on [the IRS] and [are] not a final case determination," and that "[s]uch advice is advisory and does not resolve [the IRS's] position on an issue." *See, e.g.*, I.R.S. FSA, 1996 WL 33321253 (May 2, 1996). Indeed, Congress has specifically instructed that FSAs do not set precedent. *See Brunswick Corp. v. United States*, No. 07 C 3792, 2008 WL 5387086, at *11 (N.D. Ill. Dec. 22, 2008) (citing *Vons Cos. v. United States*, 51 Fed. Cl. 1, 12–13 (2001), and 26 U.S.C. § 6110(k)(3)); *accord ABC Beverage Corp. v. United States*, 577 F. Supp. 2d 935, 951 n.18 (W.D. Mich. 2008) ("[The Government] correctly points out that . . . [FSAs] are considered written determinations under 26 U.S.C. § 6110(b)(1)(a) and have no precedential value under 26 U.S.C. § 6110(k)(3).").

In any event, Lehman's arguments are misplaced. Professor Brown was retained by the Government to serve as a rebuttal expert to address issues raised by Lehman's purported experts, attorneys Steven Hannes and David Foster. *See* Brown Rep. at 1 ("I have been retained by [the Government] to respond to expert reports provided by David Foster and Steven Hannes in connection with the above-referenced matter."). Neither Foster nor Hannes ever mention the FSAs, on which Lehman now so heavily relies, in their reports. Indeed, there is no suggestion that Lehman's supposed experts even read the FSAs in preparing their reports, as they are not included in the lists of materials on which these experts relied that accompanied their reports. *See* Foster Rep. Ex. B; Hannes Rep. Ex. B. As a result, Professor Brown's report also did not discuss the FSAs, since neither Foster nor Hannes referenced or relied upon them. At Professor Brown's deposition, however, Lehman's counsel introduced two of the FSAs as exhibits and asked her questions about them.

The FSAs in question are long, complicated memoranda written by attorneys in the IRS Chief Counsel's office that address several legal questions — having little or nothing to do with the character of payments subject to ACT for U.S. tax credit purposes — in the context of particular taxpayers' disputes with the IRS.[1] The convoluted facts in each are heavily redacted to shield taxpayer information, as required by 26 U.S.C. § 6103. It is thus not surprising that Professor Brown paused to review these documents at her deposition, and that, even after a brief review of less than a minute, she was unwilling to express a definitive view of these documents.

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[1] Lehman showed Professor Brown two FSAs: (1) I.R.S. FSA, 1997 WL 33314842 (June 24, 1997), and (2) I.R.S. FSA, 1996 WL 33321253 (May 2, 1996). The first FSA, dated June 24, 1997, is a six-page memorandum in response to a request made three weeks earlier on June 3, 1997. *See* I.R.S. FSA, 1997 WL 33314842 (June 24, 1997). The second FSA, dated May 2, 1996, is a thirteen-page memorandum in response to a request made more than three months earlier, on January 18, 1996. *See* I.R.S. FSA, 1996 WL 33321253 (May 2, 1996). These documents were introduced as Exhibits 10 and 11, respectively, at Professor Brown's deposition.

This is particularly true since neither of the FSAs Lehman showed Professor Brown addressed the precise issues in this case.

Contrary to Lehman's suggestion, Professor Brown repeatedly disagreed with how Lehman's counsel described these documents. For example, in the long colloquy concerning I.R.S. FSA, 1997 WL 33314842 (June 24, 1997), Professor Brown expressly disagreed with the description of this document by Lehman's counsel, *see* Brown Tr. at 231-32, and later informed Lehman's counsel that she was "confused by [his] characterization of this FSA," *id.* at 237.[2]

Moreover, the testimony Lehman latches onto stems from an objectionable line of inquiry. For instance, in his objectionable question, Lehman's counsel characterizes the FSAs as embodying "three interpretations, maybe four interpretations" of the Treaty, *see* Brown Tr. at 255-56, and Lehman now claims in its letter that there are six such administrative memoranda.[3] But Lehman showed Professor Brown just two of the supposedly six documents at her deposition. Lehman cannot now be heard to complain that Professor Brown was unable — on the spot during her deposition — to "reconcile" documents that she was not shown at the deposition and which Lehman's own experts did not rely upon.

More importantly, the entire colloquy cited in Lehman's letter concerned one of the two FSAs, I.R.S. FSA, 1996 WL 33321253 (May 2, 1996), *see* Brown Tr. 247-61, which explicitly labels its analysis as provisional, concluding that "[w]e are currently considering several other cases that present this issue and are continuing to develop our position." This FSA was indeed later supplemented in 1997 in ways that are relevant to Lehman's line of inquiry, *see* I.R.S. FSA, 1997 WL 33314835 (July 31, 1997),[4] and which renders the language that Lehman relied upon moot, though Lehman omitted these facts from its questioning of Professor Brown or its briefing to this Court. In this respect, it is telling that the "pauses" which Lehman finds so probative occurred immediately after Lehman's counsel described the language of the initial 1996 FSA while omitting any mention or description of its provisional status or of the subsequent clarifying 1997 FSA. Moreover, the 1997 FSA embodies the same anti-cherry-picking position that the Government is advancing in this case.[5] It is disingenuous for Lehman to seize on Professor

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[2] The Government has attached the relevant pages from Professor Brown's deposition to this letter.

[3] Curiously, one of the six documents cited by Lehman, I.R.S. FSA, 1996 WL 33107176 (Sept. 23, 1996), makes absolutely no mention of the Treaty.

[4] The Government's Reply Memorandum of Law incorrectly cited this document as **1996** WL 33314835, *see* Reply Br. at 2 n.2; the correct citation is provided above.

[5] Cherry-picking refers to an improper effort by a taxpayer such as Lehman to pick and choose between provisions of the Internal Revenue Code and a treaty in an inconsistent manner,

Brown's testimony concerning the 1996 FSA, which was not considered by Lehman's own experts, in an effort to manufacture ambiguity in the Treaty. This is particularly true since Lehman's counsel failed to advise Professor Brown that the provisional 1996 FSA had been supplemented by the IRS a year later in a manner completely consistent with the Government's arguments in this case.

Lehman's effort to point to a pause in response to an objectionable line of questioning about an outdated FSA that was labeled as explicitly provisional and was supplemented one year later does not justify its request for a sur-reply. Rather, it illustrates the fundamental point that the Government has made throughout this litigation: arguments concerning the interpretation of the Treaty, which is a question of law, can and should be confined to briefs filed by counsel, and should not be based on inadmissible testimony by lawyers masquerading as experts.

Accordingly, the Government respectfully requests that the Court deny Lehman's request to file a sur-reply brief and grant its motion *in limine*.

Respectfully,

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relying only on those it views as helpful to its position while ignoring those provisions that uncut its claim for tax benefits.

treaty -- excuse me, in the context of this FSA? In fact, it's on page 4?

A. Yes, it's on 4. "The income on which the tax is imposed is readily traceable" --

Q. Where are you on?

A. Page 4.

Q. What paragraph, so we can follow?

A. First full paragraph.

Q. Go ahead.

A. "The taxes thus should be placed in the same separate category or categories in which the dividends would belong if they were includable in US income."

Q. But they are not; am I right?

A. I think they are putting -- they are treating everything as going into the same basket as they would go into, and they are treating the ACT payment as a dividend.

Q. They are not. Look at the last two sentences on their conclusions on the ACT refund.

After they cite specifically to iii and explain the exact provision that you cite --

A. Oh.

Q. -- they say, "Therefore, we conclude that an ACT refund under Article 10, paragraph 2 of the

treaty should be treated as a dividend for US tax purposes. Because these two entities are members of the same consolidated group, the ACT refund that is treated as a dividend should be eliminated on a consolidation."

A. I'm sorry, they are treating it as a dividend, and, therefore, then -- ah, you're saying, and, therefore, they're treating it as a dividend for purposes beyond the foreign tax credit rules.

Q. No. They are treating it -- they applied US principles in analyzing whether it should be treated as gross income, whether it should be treated as foreign source income for foreign tax credit purposes, and for purposes of basketing, they are using US principles, in all three categories. Whether it's income, whether it's FSI, and what basket it should go in, they don't treat it as a dividend pursuant to iii, even though they cite to iii and quote the very language you rely on.

MR. BOEVING: Is there a question?

MR. MADEN: She asked me a question. I'm answering her.

BY MR. MADEN:

Q. How do you reconcile that with your analysis?

MR. BOEVING: Now I'm going to object.

THE WITNESS: You say they are applying US principles to determine that it is a dividend?

I think they are determining the consequences after concluding that it is a dividend under Article 10 of the treaty.

They are saying it is a dividend, and then they are determining the US consequences after determining that it is a dividend.

BY MR. MADEN:

Q. Okay. But if -- let's just take it one step at a time.

If it were a dividend, then you would have taxable income in the United States. Instead, it is on consolidation. Pursuant to the US tax rules, it is treated -- it is excluded from the US taxpayers.

A. Because of the consolidated return regs, not because it's not treated as a dividend.

Q. Okay. Well, let's not have that debate.

Let's take your point much more directly. Let's take your point much more directly. Look at, on page 3, the paragraph that begins "because - 333," where the FSA says "however."

"However, the foreign taxes paid with respect to the dividend, both the income tax and the

withholding tax, remain creditable taxes and can be used if the group has other foreign source income in the same separate limitation category against which to offset them."

If the IRS were interpreting iii in the same way you are, the so-called dividend that is distributed up would create foreign source income. They wouldn't need other foreign source income.

A. It would create foreign source income if it weren't eliminated on consolidation.

MR. BOEVING: Objection.

BY MR. MADEN:

Q. We literally just went through this before we got into it, and I asked you, would the -- your interpretation of iii have the effect of giving the US taxpayer foreign source income, even though, in the first example, by virtue of the return of capital rules, there was no gross income; in the second example, the consolidated return regs limited the income. And to both questions, you said "yes."

And so if you want to revise your answer, let's revise it.

A. That there would be --

MR. BOEVING: Object to the question.

THE WITNESS: That there would be no US

source income after the consolidation, as a result of the consolidation.

BY MR. MADEN:

Q. We're not talking about any US source income. We're talking about foreign source income.

A. I'm sorry, foreign source income, for US tax purposes.

Q. Okay. So that is different than what you said earlier, but we'll let the record speak for that.

Is your new testimony that -- I don't even know what your new testimony is. Why don't you explain to me how this works.

A. Can we take a break while I read this?

MR. BOEVING: Let's just do it on the record.

MR. MADEN: No, no. I can't use my time for that.

MR. BOEVING: It's your document. And this is what you wanted her to do.

MR. MADEN: But she can answer based upon my representations, if she understood.

MR. BOEVING: She's entitled to review the document that you handed her. If you don't want her to talk about it, you can pull it

away.

MR. MADEN: That's fine. Go ahead and review it. But I'm tolling my time during this period.

MR. BOEVING: We're not accepting any tolling of time. It's an exhibit that you handed her that --

MR. MADEN: She said she did consider summaries of these exact exhibits.

MR. BOEVING: You didn't consider the actual. You handed her an exhibit that's not listed in her report to date. Therefore, if she wants to take time to review it, she's entitled to do that.

MR. MADEN: There is a tolling.

MR. BOEVING: It's not tolling.

MR. MADEN: It is a tolling charge.

MR. BOEVING: It's not a freeway.

MR. MADEN: I'm going to go off the record. I'm going to use the men's room.

THE VIDEOGRAPHER: We're off the record. The time is 5:34 p.m.

(Thereupon, a recess was taken, after which the following proceedings were held:)

THE VIDEOGRAPHER: Back on the record. It

is 5:38 p.m.

BY MR. MADAN:

Q. Ms. Brown.

A. I'm confused by your characterization of this FSA.

Q. Okay.

A. The way I read this, what is the Internal Revenue Service, what Barbara Felker said, this is not -- or what Karen Shine, with the approval of Barbara Felker, said, because it's not a general interpretation, but it is their position in this case.

What they said is the treaty tells us it's a dividend.

Q. Uh-huh.

A. So we will treat it as a dividend.

Q. Uh-huh.

A. Then we will apply US tax law to it as a dividend and see what happens, which is we eliminate the dividend under consolidation. We then give a credit for the taxes that are deemed to have been paid to the UK, and we basket it as if it were a dividend. And we include --

Q. Huh-huh. I'm sorry, carry on. Finish your answer.

A. I'm sorry.

The conclusion says, first, blank --

Q. You've got to tell us where you are so we can follow.

A. I'm in the conclusion.

Q. Okay. First, okay.

A. "First, the taxpayer should be treated as having received a dividend from the sub."

Q. Yes.

A. "And taxes deemed paid under 902-A should be computed without taking into account the surrendered ACT.

"Next, the --

Q. Well, let's just stop right there.

The taxes deemed paid under 902 should be computed without taking into account -- okay. Fine. Carry on. Sorry.

A. "Next, the taxpayer should be treated as having paid the entire amount of unrefunded ACT, and then claim a credit for that amount under section 901-A.

"And, finally, although both the actual dividend and the ACT dividend are eliminated from the taxpayer's gross income under the consolidated return regs, they may claim a credit for the

withholding tax imposed on the dividend and ACT dividend under section 901-A."

So they can take a foreign tax credit, they treat it as a dividend, and they eliminate it on consolidation by applying the US domestic law rules applicable to dividends.

So it's exactly what I said.

Q. Okay. But you were going to reconcile for me the comment on page 3, the "however" sentence. It's in the paragraph that begins "because" in the middle of the page. Four lines down.

A. Yes. Because the dividend is eliminated on consolidation, the foreign tax credit is usable only if -- so they did not treat it -- they treated it as gross -- they treated it as dividend income for purposes of the foreign tax credit rules. As dividend income, it was subject to limitation.

Q. Where do you see that?

A. The rule language that says it's treated as a dividend and eliminated on consolidation. "Therefore, we conclude that an ACT refund under Article 10, paragraph 2 of the treaty should be treated as a dividend for US tax purposes. Because they are members of the same consolidated group, the ACT refund that is treated as a dividend should be

eliminated on consolidation."

Q. But that's like saying we treat it as a dividend -- am I correct, that's like saying we treat it as a dividend, but since the distributing corporation has no US EMP, we eliminate that from income?

I mean, that's not saying anything.

If it were a dividend, am I correct --

A. No, it's not the same. I'm sorry. Go ahead.

Q. So look at -- and then what about in terms of basketing? You think that the discussion on the bottom of page 3, in terms of basketing, is treating this distribution as a dividend?

MR. BOEVING: Just note my objection.

THE WITNESS: You're confusing characterization and consequences.

BY MR. MADAN:

Q. Explain the difference there.

A. It is characterized as a dividend for purposes of the foreign tax credit rules.

Q. Uh-huh.

A. And the consequences of that are that it is eliminated, just like the consequences of being treated as a dividend in this case is that 901-K

applies.

Q. So going back to my earlier question, you said, when we were discussing this earlier, that even if something is eliminated on consolidation, or for other reasons, for purposes of gross income, that it, nevertheless, generates foreign source income.

A. I misspoke.

Q. You've changed your answer on that now?

A. Well, no, no, no.

Q. I asked you that three times.

A. I said it produces foreign source income. Dividends are foreign source income. Does it -- but this is not a rule that relates to the determination of the foreign tax credit limitation. This is a rule that goes to how it is treated. What are the consequences more generally.

I think I also specifically said I'm not an expert on consolidated foreign tax credit rules, but...

Q. I mean, is it fair --

A. It is a foreign source dividend, and it is subject to the foreign tax credit rules.

Q. Okay. I mean, is it fair to say that you don't really know how iii applies, what it does?

Q. Okay. This is the FSA -- another FSA which has been marked PB 11, which is commonly referred to in the IRS as a stock dividend example. It's a joke.

You'll note, Ms. Brown, because I'm a little bit short on time here, this is another FSA that is authored by Ms. Felker. I don't know -- can you tell who the attorney advisor is?

A. Grace Fleeman?

Q. Who you said you work with?

A. Yes, I did say that.

Q. So you'll note -- I'm happy to let you look at page 1, which has basically the facts very quickly summarized, if that helps you. And then I want to get into some of the analysis.

MR. BOEVING: Correction to the record, I don't think Ms. Felker authored this one. I don't think she did. It looks like it's Donald Williamson.

MR. MADAN: On the first page, look on the first page.

MR. BOEVING: I was looking for the signature block.

THE WITNESS: Actually, let me --

MR. MADAN: It's from Barbara Felker.

MR. BOEVING: I misspoke. The first page does say it's from Barbara Felker.

(A discussion was held off the record, after which the following proceedings were held:)

BY MR. MADAN:

Q. So if we go to the analysis section, you'll notice that the question that's posed is -- among the questions, is whether the parent properly excluded these distributions from income and stock dividends.

I'm going to direct your attention to page 4, where you will see the very common analysis in this FSA, and even your analysis, where they go through the US/UK treaty and conclude: "Notwithstanding the fact that in general there is no income reported, the taxpayer would be entitled to a credit."

But before that, they basically lay out the rule of the US/UK treaty and the Rev Proc 8018. You'll see that on page 4, the second-to-last paragraph says, "Second, under Article 10, 2-A, iii, it says the sum" -- it's not the even the word "aggregate." Ms. Felker and her team have interpreted that as the "sum of this payment from

the UK government and the dividend paid by the UK subsidiary is treated as a dividend for US foreign tax credit purposes, and under article 10, 2-A, i, is subject to UK withholding tax of 5 percent. This 5 percent withholding tax is treated as a creditable income tax paid by the US shareholder under Article 23, 1-B."

So they have, at their disposal, the very provision, iii, and quoting the language -- actually, paraphrasing the language of "aggregate" as the "sum" of, in analyzing the various questions that are posed in this FSA.

And so -- and you will see that the UK tax treatment of the sub, the credit is imposed on page 5, and then the income is excluded. They analyze 305 on page 6.

Then as consistent with your point about arbitrage, there is an analysis of sticking the taxpayer to its form under some common law, including this case called Coleman, which I'm sure you're familiar with, Danielson.

Then on page 10 is the analysis that I want to discuss with you. This is the section on foreign tax credits with respect to cash distributions.

And in A, it says, "If distributions are taxable dividends in the US," and I will just note that in 2-B, if distributions are non-taxable stock dividends in the US.

So the IRS, in this FSA, analyzes it both ways: Whether it's in income for purposes of the US and out of income for purposes of the US.

And you will notice that in 2-A, it says, "If the service succeeds in requiring US parent to include an income the full amount of the cash distributions, the US parent would be entitled, subject to limitations of section 904, to a foreign tax credit under section 901 for the 5 percent withholding tax, and also to credit under section 902 for additional taxes based on UK sub's post-1986 pools of earnings and taxes in the year of distribution.

"As noted above, only the unrefunded portion of the ACT imposed on the distribution is properly included in UK sub's tax pools, and the adjustments to the pool would be required in the event the full amount of the ACT does not apply to reduce UK sub's mainstream tax." And they go on to cite.

And here is the part that's interesting:

"Taxes claimed as credits would be allocated separate section 904-D categories based on look-through rules to the earnings of UK sub out of which the dividend is paid." Then there's a cite.

Do you see that?

A. Yes.

Q. So there's a parallel there. If it's included in income, this is how you do it. If it's excluded from income, which is section B, the FSA goes on to say, "The UK withholding tax is acknowledged to be a credible tax in Article 23, 1-B of the US/UK treaty. According, in our view, the UK withholding tax paid by parent with cash distribution is creditable, even if the distributions are excluded from income as non-taxable stock dividends in the US."

That's consistent with what you said, correct?

A. I believe so.

Q. Okay. Now, the next sentence, "No credit would be available under section 902 with respect to the cash distribution, since no dividend would be considered paid under US law."

That is inconsistent, am I correct, with what you've testified about here today?

A. (No response.)

Q. Then I will go on to read for you the next paragraph down, which says, "For section 904 purposes, the withholding tax would be assigned to the general limitation category of section 904, D-1, I, see section 1.904-6 A-1, iiii, providing that a creditable tax paid with respect to an item that does not constitute income under US tax principles shall be treated as imposed with respect to general limitation category."

Again, not treating it as a dividend for US foreign tax credit purposes.

So in two separate instances, this FSA very explicitly says that to the extent the amount is not included in income, regardless of iii, for foreign tax credit purposes the amount is not treated as a dividend.

I want to get to your reaction to that in terms of reconciling with your own analysis.

MR. BOEVING: Objection, and my live note stopped working. Could we go off the record?

THE VIDEOGRAPHER: The time is 6:04 p.m.

(Thereupon, a recess was taken, after which the following proceedings were held:)

THE VIDEOGRAPHER: Back on the record.

The time is 6:06 p.m.

THE WITNESS: Your question is how do I reconcile it?

BY MR. MADAN:

Q. Yes.

A. I don't. I think I said that the -- I said long ago that the IRS would take -- might well take a different position.

Q. So you agree that -- oh, I'm sorry.

A. And --

Q. Please, I didn't let you finish.

A. That they might take a different position. And I also pointed out, although then it wasn't in response to a question but now it will be, that FSAs are not finding on examination or appeals, and I would also be curious about whether this is actually litigated or not, and how it was decided.

Q. Regardless of whether it was litigated or not, the branch chief responsible at the IRS national office for managing the interpretation of the foreign tax credits rules, including when treaty issues come up, interpreted iii inconsistent with your interpretation. I have demonstrated two instances in the two FSAs we reviewed, but there are others.

And my question is: Does that cause you to pause about whether your interpretation is accurate?

MR. BOEVING: Just note my objection.

THE WITNESS: No, not really.

BY MR. MADAN:

Q. I mean, if we're doing a score card here, let's review the bidding.

The TE interprets iii -- the TE, which was drafted contemporaneously with the treaty itself, interprets iii consistently with the way we do, at least as it relates to direct investors, applying US principles in calculating EMP and determining when a dividend exists.

The IRS has, at least on two occasions, that we've confronted you with here today, have interpreted it, when confronted with very similar questions of how to apply iii, interpreted it consistently with the way Lehman's experts have interpreted it.

There is no -- and perhaps this 1986 competent authority agreement, which I also have reviewed, also interprets it consistently.

There is not contrary interpretation either by the IRS or otherwise consistent with your

interpretation.

MR. BOEVING: Objection, form and foundation.

BY MR. MADAN:

Q. Is that correct?

A. I think that the chief counsel advice is consistent with my interpretation.

Q. The chief counsel advice in this case?

A. Yes.

Q. That's it, though?

A. The field service advice are advisories given, as I have -- they took different positions with respect to different situations.

Q. I mean, the thing that I have trouble reconciling is, you, your report, indicates, and you have testified here today, that the language in iii is so clear, it is so definitional, it's so obvious -- my words, not yours -- that an alternative interpretation, certainly one that's been articulated by our expert witnesses, is inappropriate. And yet, there have been three interpretations, maybe four interpretations, of that same provision that have been completely consistent with our experts, and the people who are drawing these interpretations are either experts in the IRS

national office or people who were contemporaneously involved in the treaty negotiations.

I'm having a hard time reconciling that. Maybe you can for me.

MR. BOEVING: Same objection.

THE WITNESS: Again, I do not remember saying the words "obvious, incapable of other interpretations," or any of the other characterizations that you made of my prior testimony.

BY MR. MADAN:

Q. Okay.

A. What I said is that in light of the range of deviations from US domestic law, the provision at issue, which may result in a change of character in which Mr. Foster describes as unprecedented, is not even particularly remarkable.

There is then a discussion of how the exceptions to the saving clause work.

Q. Let me ask the question this way: Would you agree, then, that iii is ambiguous enough that the IRS itself could interpret it consistently with the way Lehman has interpreted it, and repeatedly, I might add, the technical -- the Treasury explanation is consistent with our interpretation?

Is it ambiguous enough that different people reading that provision could interpret it in the two different ways the parties have in this case?

MR. BOEVING: Just note my objection.

You can answer.

THE WITNESS: Obviously, the people at the IRS are smart people. Barbara Felker knows the foreign tax credit rules inside and out.

BY MR. MADAN:

Q. Yes.

A. Barbara is not a tax treaty expert. When the IRS is interpreting things, they obviously are making a conscientious effort to apply the rules.

Did they interpret this differently than I would? Obviously.

I have never -- I do not remember saying this is clear or obvious or not capable of other interpretations.

Q. So it is capable of other interpretations?

A. I have never said one way or the other whether it is. I believe -- and if you want to go off the record briefly, I will go through and look at the conclusions in my expert report.

Q. I'm not trying to do that. I just want to

ask you this one simple question.

Given what we've seen in the IRS's interpretation and the TE, I mean, is it fair to say that this provision is one in which different people reviewing the provision could interpret it differently?

A. I suppose so, since you have a different interpretation than I do.

Q. I could have a different interpretation from you, and you could think my interpretation is objectively absurd, to use a word you used in another context.

I'm asking you, objectively speaking, as a treaty expert, whether it is objectively reasonable to conclude that given the way this provision has been interpreted, and not interpreted for that matter, that it is reasonable that different people could interpret that provision differently?

A. The problem that the IRS has is that the technical explanation is part of the Treasury department's testimony to the Senate. And, therefore, it is difficult for the IRS to take positions that are inconsistent with the technical explanation.

That doesn't mean that objectively the

technical explanation is correct or not. It is simply that -- that the IRS is going to rely on the technical explanation.

Q. Could you just answer my question, though? Mine is a yes-or-no one.

You just went on to explain or reconcile why the IRS interpreted the way it did.

I think you know what my question is.

A. Could you repeat it?

Q. My question is: Is it objectively reasonable for different people, experts, reviewing iii, to interpret it differently in the way the respective parties in this case have?

A. I was with you until you got to "in the way that different experts have in this case."

Q. Well, how about this. I'll take the experts out of it.

Differently in the way you have and the way the IRS and the TE does?

A. The TE was a reasonable attempt to try to deal with a provision that didn't do what the Treasury department wanted it to do.

Q. I'm happy for you to give me whatever answer you want after a yes or no. You can say no, you can say yes, but then you can clarify. Can I

get a yes or no?

A. The question of whether it is reasonable?

Q. Yes. Yes or no?

A. Is it a reasonable interpretation of that provision? No.

Q. The IRS's is unreasonable?

A. No. The technical explanation.

Q. How about the IRS's? Is the ones we've just gone through, the 305 FSA, that is an unreasonable interpretation of iii, is your testimony?

A. I don't think it's what iii means.

Q. So you think that that FSA was unreasonable?

A. No, because the FSA was based on the technical explanation.

Q. Where in the FSA did you see that it was based on the technical explanation?

By the way, just to be clear, because I'm a little limited on time, you're referring to the TE, Article 23, example 4, correct, when you say that?

Hello? You can look for it in a second. Can you just answer my question? I just want to clarify what you mean by the TE, based on the TE.

You mean --

A. The examples related to direct dividends.

Q. Specifically in example 4?

A. I don't know if it was example 4.

Q. But the samples relating to the direct investors?

A. Yes.

Q. Yes.

If there's no citation to the examples in the TE --

A. The FSA refers to the technical explanation in Rev Proc 80-18. The technical explanation of the US/UK treaty explains how the unique features of the UK imputation system mesh with the US foreign tax credit rules, particularly with the rules of 902, and address issues involving timing of the US foreign tax credit, see 1980-1, CV 455. It's on page 5 of that one.

Q. So you think that based on that, the IRS national office was trying to stay consistent with the TE in the examples?

A. I believe so, without having gone back and compared the facts of the FSA with the facts of examples in the TE.

Q. Okay. Let me ask -- let me move away from